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Academic Freedom as Private Ordering: Politics and Professionalism in the 21st Century

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ACADEMIC FREEDOM AS PRIVATE ORDERING: POLITICS AND PROFESSIONALISM IN THE 21ST CENTURY

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INTRODUCTION

I have assumed, for purposes of this article, that there is consensus at most institutions of higher education that the principle of academic freedom applies to the relationship between faculty and the institution that employs them. I also have assumed that academic freedom applies to the relationship between public universities and the state or federal government. What follows is a meditation on the meaning of a normative principle, academic freedom, in light of recent events and contemporary social movements.

While most discussions of academic freedom begin with the judicial acknowledgment that the First Amendment protects certain speech rights in the university setting,[1] I would simply

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1. *See* Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957) ("The essentiality of freedom in the community of American universities is almost self-evident."); Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967) ("Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of

agree with those who argue that academic freedom is normative, a standard which is often associated with contractual terms governing the relationship between faculty and the institutions at which they teach.[2] The norm has been formally adopted in a process of private rule making or reglementation. The reasonable expectation of faculty that they will have autonomy in teaching, and to a lesser degree, in scholarship, is expressed in the 1940 Statement of Principles on Academic Freedom and Tenure ("1940 Principles").[3] These principles were adopted by the American Association of University Professors ("AAUP")[4] and have been embraced by the Society of American Law Teachers ("SALT").[5]

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orthodoxy over the classroom."). Much of the scholarship on academic freedom focuses on the distance between the rhetorical stance taken by courts and the results in decided cases. *See, e.g.*, J. Peter Byrne, *Academic Freedom: A "Special Concern of the First Amendment,"* 99 YALE L.J. 251, 252-53 (1989) ("Attempts to understand the scope and foundation of a constitutional guarantee of academic freedom, however, generally result in paradox or confusion. The cases, shorn of panegyrics, are inconclusive, the promise of their rhetoric reproached by the ambiguous realities of academic life."); Alan K. Chen, *Bureaucracy and Distrust: Germaneness and the Paradoxes of the Academic Freedom Doctrine*, 77 U. COLO. L. REV. 955, 956 (2006) (noting that the one constant in cases involving individual academic freedom is that there is no "coherent explanation of why and how the First Amendment applies").

2. *See* Urofsky v. Gilmore, 216 F.3d 401, 412, 424 (4th Cir. 2000) (disagreeing with the contention that academic freedom is a constitutional right but noting that as a professional norm for public university professors, it may still be subject to "state supervision and public accountability"); Jim Jackson, *Express and Implied Contractual Rights to Freedom in the United States,* 22 HAMLINE L. REV. 467 (1999) (recognizing both the constitutional and contractual nature of academic freedom). The contract between faculty member and university is the paradigm of a relational contract in which custom might be said to apply. *See* Stewart Macaulay, *Relational Contracts Floating on a Sea of Custom? Thoughts About the Ideas of Ian MacNeil and Lisa Bernstein*, 94 NW. U. L. REV. 775, 785 (2000) (offering a wry but useful illustration of the slipperiness of custom as a contract term).

3. AM. ASS'N OF UNIV. PROFESSORS, 1940 STATEMENT OF PRINCIPLES ON ACADEMIC FREEDOM AND TENURE WITH 1970 INTERPRETIVE COMMENTS, *available at* http://www.aaup.org/NR/rdonlyres/EBB1B330-33D3-4A51-B534-CEE0C7A90DAB/0/1940StatementofPrinciplesonAcademicFreedomandTenure.pdf [hereinafter 1940 STATEMENT OF PRINCIPLES].

4. *Id.* The AAUP consists of 45,000 faculty, librarians, and academic professionals who work at accredited junior and four-year colleges and universities. AAUP Mission & Description, http://www.aaup.org/AAUP/About/mission (last visited May 31, 2007). The mission of the organization is "to advance academic freedom and shared governance, to define fundamental professional values and standards for higher education, and to ensure higher education's contribution to the common good." *Id.*

5. *See* Brief for Society of American Law Teachers as Amici Curiae Supporting Appellants, *In re* Executive Committee on Ethical Standards Re: Appearance of Rutgers Attorneys Before the Council on Affordable Housing, 561 A.2d 542 (1989) (citing the 1940 Principles in support of their argument). SALT is the largest

Both the AAUP and the SALT are membership organizations for faculty, one side of the contractual relationship. The 1940 Principles have also been endorsed by the other side of this relationship–the Association of American Colleges and Universities ("AAC&U")[6] and the Association of American Law Schools ("AALS").[7]

Since the initial adoption of the 1940 Principles, the AAUP and several other organizations have issued statements pertaining to academic freedom. The AAUP and AAC&U drafted and adopted Interpretive Comments in 1970,[8] and the AAUP adopted additional statements or reports on particular issues over the years.[9] The Association of American Universities

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independent organization of law teachers in the nation, with a membership base of 900 law professors, librarians, and administrators at more than 160 law schools throughout the United States. Letter from the Board of Governors of the Society of American Law Teachers to the Board of Regents of the University of Colorado (Feb. 2005), *available at* http://www.saltlaw.org/Churchill%20Letter.doc. It is a community of progressive educators who are dedicated to making a difference through the power of law; encouraging the use innovative teaching styles and materials to make our classrooms more inclusive; challenging faculty, staff, and students to work towards greater equality, justice, and excellence in legal institutions; and organizing a community of progressive academics to promote core values of equality and justice and to resist inequitable social policies. *See* Society of American Law Teachers, http:// saltlaw.org (last visited May 31, 2007).

6. *See* Endorsers of the 1940 Statement by Date, http://www.aaup.org/AAUP/pubsres/policydocs/1940endorsersDate.htm (last visited May 31, 2007). A general description of the AAC&U can be found on their website. *See* http://www.aacu.org/membership/index.cfm (last visited May 31, 2007) ("AAC&U's more than 1000 institutional members are liberal arts colleges, two-year colleges, research and doctoral-granting universities, master's-degree colleges and universities, professional universities, and systems offices. They are independent and public, large and small, rural and urban, residential and commuter. Through their membership in AAC&U, they express their belief in the importance of a liberal education for all of their students.").

7. See Endorsers of the 1940 Statement by Date, http://www.aaup.org/AAUP/pubsres/policydocs/1940endorsersDate.htm (last visited May 31, 2007). The membership requirements for the AALS are set out in the Bylaws. *See* Bylaws and Executive Committee Regulations Pertaining to the Requirements of Membership, http://www.aals.org/about_handbook_requirements.php#6 (last visited May 31, 2007). Bylaw Section 6-1(b)(ii) identifies academic freedom as a core value of the organization. *Id.*

8. *See* 1940 STATEMENT OF PRINCIPLES, *supra* note 3 (including the 1970 Interpretive Comments).

9. See AM. ASS'N OF UNIV. PROFESSORS, ON FREEDOM OF EXPRESSION AND CAMPUS SPEECH CODES (1994), *available at* http://www.aaup.org/NR/rdonlyres/CCB4207F-81FA-4286-8E25-40185AD74519/0/OnFreedomofExpressionandCampusSpeechCodes.pdf (initially approved by the AAUP's Committee A on Academic Freedom and Tenure in 1992 and adopted by the AAUP Council in 1994); AM. ASS'N OF UNIV.

adopted a Statement of the Rights and Responsibilities of Universities and Their Faculties in 1953,[10] and the American Council on Education created a statement on Academic Rights and Responsibilities in 2005,[11] which was endorsed by all of the organizations mentioned earlier and others as well. Finally, the AAC&U adopted a Statement of Academic Rights and Responsibilities of its own in 2006.[12]

The proliferating "statements" over the years either supplement or clarify the 1940 Principles but do not diminish the commitment to academic freedom. Nor do they suggest that the basic tenets of academic freedom–its general contour or shape–are in dispute. These elaborations on the 1940 Principles, if we

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PROFESSORS, STATEMENT ON PROFESSIONAL ETHICS (1987), *available at* http://www.aaup.org/NR/rdonlyres/3B3F65BF-AA8F-4EC2-90C2-DA83380C8CB4/0/StatementonProfessionalEthics.pdf (endorsed by the AAUP's Seventy-Third Annual Meeting); AM. ASS'N OF UNIV. PROFESSORS ET AL., JOINT STATEMENT ON RIGHTS AND FREEDOMS OF STUDENTS (1967), *available at* http://www.aaup.org/NR/rdonlyres/FC7EE798-039B-43F6-BE2E-7989729A7B66/0/StudentRightsandFreedomsJointStatementonRightsandFreedomsofStudents.pdf (formulated and endorsed by a joint committee consisting of the American Association of University Professors, the United States Student Association, the Association of American Colleges and Universities, the National Association of Student Personnel Administrators, and the National Association of Women Deans and Counselors). I would suggest that distinctions should be made between statements which are approved by the AAUP Council and those which are either approved at an Annual Meeting of the AAUP or created through a deliberative process that includes representatives of other national organizations and is endorsed by other organizations.

10. ASS'N OF AM. UNIVS., THE RIGHTS AND RESPONSIBILITIES OF UNIVERSITIES AND THEIR FACULTIES (1953), *available at* http://www.aau.edu/reports/RRofU.html [hereinafter RIGHTS AND RESPONSIBILITIES]. What is striking about this statement is the use of patriotic and nationalistic language in support of individual liberty for faculty. Universities produce "intellectual capital" and are the "instruments of cultural progress and national welfare." *Id.* Faculty are loyal to the ideal of learning but also "to the country, and to its form of government." *Id.* Competition among ideas is the "surest safeguard of truth." *Id.* It would destroy the free enterprise system and put a stop to learning to require "uniformity of outlook" amongst faculty. *Id.* The statement explicitly recognizes that faculty have an obligation "to analyze, test, criticize, and reassess existing institutions and beliefs," and that a scholar should not be timid, but should speak out in "matters of conscience" when he has "truth to proclaim," especially in his "field of competence." *Id.* The statement acknowledges the power of the courts to use the First Amendment to determine the line between freedom and privilege and between duty and obligation. *Id.*

11. AM. COUNCIL ON EDUC., STATEMENT ON ACADEMIC RIGHTS AND RESPONSIBILITIES (2005), *available at* http://www.acenet.edu/AM/Template.cfm?Section= Search&template=/CM/ContentDisplay.cfm&ContentID=10672.

12. ASS'N OF AM. COLLEGES AND UNIVS., ACADEMIC FREEDOM AND EDUCATIONAL RESPONSIBILITY (2006), *available at* http://www.aacu.org/about/statements/documents/academicFreedom.pdf.

call them that, are a response to changing political events, the recent pressure from outside groups and lawmakers, and the emerging consensus about the importance of diversity and policies of inclusion in higher education. The subsequent statements are consistent with a process of interpretation, a process that is necessary because the 1940 Principles create standards, not rules. Like most norms or contract terms, their meaning is contextual.

An interpretive process should begin with an examination of the purpose of contract term or a norm. Any discussion of the meaning of academic freedom, therefore, should begin with the traditional conception of the role of the university in American society. Universities and faculty agree that there is an affirmative obligation on the part of educational institutions to promote the exploration of ideas, which can seldom be done without disagreement or debate. When this disagreement becomes heated, one of the sides in the debate may seek to involve politicians or courts. Except in the most extreme cases, this invitation should be declined because the principle of academic freedom was created in what Sally Falk Moore calls a "semi-autonomous social field."[13] Higher education is semi-autonomous precisely because it "can generate rules and coerce or induce compliance to them."[14]

The AAUP sanctions colleges and universities which do not comply with the principle of academic freedom. The informal sanction it uses is simply shaming through the publication of a university or college's bad behavior.[15] The assumption and hope is that the fear of reputational injury will deter the most egregious behavior. The AAUP recommends a process for handling grievances with respect to violation of academic

13. Sally Falk Moore, *Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study*, 7 LAW & SOC'Y REV. 719, 720 (1973).

14. *Id.* at 722. While Moore argued that the semi-autonomous social field is defined by process, not organization, it goes without saying that the ability to create rules and to enforce presupposes the existence of institutional actors to which this power has been ceded by groups and individuals.

15. *See* Censured Administrations, http://www.aaup.org/AAUP/protectrights/academicfreedom/censuredadmins.htm?wbc_purpose=Basic&WBCMODE=PresentationUnpublished (last visited May 31, 2007). Committee A on Academic Freedom and Tenure has a staff that receives complaints, and the committee presents its cencorship recommendations to the AAUP National Council and the Membership at the Annual Meeting. *See* National AAUP Committees, http://www.aaup.org/AAUP/About/committees/default.htm#ComA (last visited May 22, 2007).

freedom, and most educational institutions have procedures for reviewing employment decisions when faculty raise the defense of academic freedom.[16] The AALS provides a grievance procedure for faculty who think they have been fired in contravention of the Principles.[17] Similarly, the AAUP recommends that there be a process for students who have grievances about the behavior of faculty in class or in grading, and most institutions of higher education provide a grievance procedure, more or less formal, for students who have complaints.[18] In addition to the more general unwarranted allegation of the widespread oppression of students, there have been highly publicized and politicized claims of faculty misconduct. At least one of these involved allegations of mistreatment of students,[19] but the other extraordinary case,

16. *See* 1940 STATEMENT OF PRINCIPLES, *supra* note 3 ("In all cases where the facts are in dispute, the accused teacher should be informed before the hearing in writing of the charges and should have the opportunity to be heard in his or her own defense by all bodies that pass judgment upon the case."); AM. ASS'N OF UNIV. PROFESSORS & ASS'N OF AM. COLLEGES, 1958 STATEMENT ON PROCEDURAL STANDARDS IN FACULTY DISMISSAL PROCEEDINGS (1958), *available at* http://www.aaup.org/NR/rdonlyres/019FCC19-7DBE-4D2A-B8AD-B0588022D366/0/1958StatementonProceduralStandardsinFacultyDismissalProceedings.pdf (providing standards for "academic due process" that should be observed in dismissal proceedings).

17. *See Model Code of Procedure for Academic Freedom and Tenure Cases*, 21 J. LEG. EDUC. 222 (1968) (printing the Model Code of Procedure for Academic Freedom and Tenure Cases as approved by the AALS Committee on Academic Freedom and Tenure on Dec. 29, 1967).

18. *See* AM. ASS'N OF UNIV. PROFESSORS COMMITTEE A ON ACADEMIC FREEDOM AND TENURE, THE ASSIGNMENT OF COURSE GRADES AND STUDENT APPEALS (1997), *available at* http://www.umich.edu/~aaupum/gradesrb.html (issuing guidelines for the right of students to appeal grades and the procedures to follow in doing so); AM. ASS'N OF UNIV. PROFESSORS ET AL., JOINT STATEMENT ON RIGHTS AND FREEDOMS OF STUDENTS (1967), *available at* http://www.aaup.org/NR/rdonlyres/FC7EE798-039B-43F6-BE2E-7989729A7B66/0/StudentRightsandFreedomsJointStatementonRightsandFreedomsofStudents.pdf (stating in note 4 that students alleging academic dishonesty or other disciplinary matters should be given the same safeguards and procedures as set forth in the procedural standards for faculty disciplinary proceedings). The highly touted victory of David Horowitz, "Pennsylvania's Academic Freedom Reforms," is thus an example of victory by means of smoke and mirrors. *See* DAVID HOROWITZ, PENNSYLVANIA'S ACADEMIC FREEDOM REFORMS (2006), *available at* http://www.frontpagemag.com/Articles/ReadArticle.asp?ID=25899 (discussing the academic freedom hearings that took place in Pennsylvania in September of 2005 and June of 2006 and the academic freedom policies instituted by universities in Pennsylvania). Rather than a "watershed event in the history of education not only in the Commonwealth of Pennsylvania, but nationally as well," the "new" policies simply reaffirm existing standards. *Id.*

19. *See* Karen W. Arenson, *Panel's Report On Faculty at Columbia Spurs Debate*, N.Y. TIMES, Apr. 1, 2005, at B1 (discussing the debate generated at the Columbia University following the report of a committee established to investigate complaints

arising out of public statements by Ward Churchill, ultimately morphed into allegations of research misconduct.[20] In both cases, the public interest and outrage is related to the political positions these academics have taken.

The degree of public attention, measured, perhaps, in terms of media coverage, make these extraordinary events a form of social drama.[21] The problem with this species of social drama is the disconnect between the broader social issues that precipitated the crisis and the particularized nature of an inquiry into the academic freedom claims of students or faculty. The procedures established by most universities and colleges to handle disputes over academic freedom are well suited for such particularized inquiries, but they do not address the concerns of the wider public. Particularity may be desirable or laudable because it is more democratic, or simply because, more often than not, it produces results that are more just. Within the social field we call higher education, the concept of academic freedom is clarified through a process of accretion, though at some point, the outside limits of variation also must be established, otherwise particularity would eviscerate the general principle.

The 1940 Principles acknowledge the importance of local knowledge and its limits, but the local knowledge is often

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by students with respect to alleged anti-Semitism of the Middle Eastern Studies department). *See also* IRA KATZNELSON ET AL., AD HOC GRIEVANCE COMMITTEE REPORT (2005), *available at* http://www.columbia.edu/cu/news/05/03/ad_hoc_grievance_committee_report.html (report of the ad hoc investigative committee at Columbia University).

20. *See* T.R. Reid, *Professor Under Fire For 9/11 Comments; Free Speech Furor Roils Over Remarks*, WASH. POST, Feb. 5, 2005, at C1 (discussing the public outcry on the Internet and in the televised media regarding a writing by University of Colorado professor Ward Churchill in which Churchill compared financial industry workers killed on 9/11 to the Nazis). *See also* REPORT OF THE INVESTIGATIVE COMMITTEE OF THE STANDING COMMITTEE ON RESEARCH MISCONDUCT AT THE UNIVERSITY OF COLORADO AT BOULDER CONCERNING ALLEGATIONS OF ACADEMIC MISCONDUCT AGAINST PROFESSOR WARD CHURCHILL (2006), *available at* http://www.colorado.edu/news/reports/churchill/download/WardChurchillReport.pdf [hereinafter CHURCHILL REPORT] (report from the committee established by the University of Colorado to investigate research misconduct claims against Ward Churchill).

21. I am using "social drama" here only in terms of the public visibility of an allegation that social norms have been violated. I am not using the term as it is broadly defined by Victor Turner: "an objectively isolable sequence of social interactions of a conflictive, competitive or agnostic type." *See* Victor Turner, *Social Dramas in Brazilian Umbanda: The Dialectics of Meaning, in* THE ANTHROPOLOGY OF PERFORMANCE 33 (1988) (providing one version of Victor Turner's theory about social drama).

vocational, rather than more broadly socio-political.[22] The resolution of any particular dispute may be determined with reference to the mission or goals of the institution or the nature and context of the dispute within the university or college, which is something most academics understand. This is not something that the public understands or appreciates.[23] What the public wants is retribution for the expression of unpopular ideas. What the public witnesses, to the extent they witness anything at all, is an abstract discussion of the standards to which faculty are held and a debate about academic ideals.

In the case of social schisms precipitated by changing demographics and attendant shifts in political power[24] or cataclysmic events,[25] a consideration of the meaning of an ideal

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22. *See* 1940 STATEMENT OF PRINCIPLES, *supra* note 3 ("Teachers are entitled to freedom in the classroom in discussing their subject, but they should be careful not to introduce into their teaching controversial matter which has no relation to their subject.").

23. For instance, the ad hoc committee at Columbia University concluded:

> In general, what we believe is most needed at this point are not further formal rules or regulations to codify behavior or sanction specific categories of action so much as the reassertion of certain norms. We need to reaffirm that sense of collective responsibility which is vital for the well-being of every community of scholars, and to nurture the mutual respect required to sustain us in our common quest for the promotion of learning and the advancement of knowledge.

See KATZNELSON ET AL., *supra* note 19. Needless to say, this was unacceptable to those who claimed generally that the Middle Eastern studies programs were unpatriotic or that they were anti-Israel or anti-Semetic. *See* Op-Ed., *Where are the Trustees?*, N.Y. SUN, Apr. 1, 2005, at 14 (quoting several reactions to the committee's report: "disgraceful"–Charles Jacobs, president of the David Project; "Whitewash"–Morton Klein, president of the Zionist Organization of America; "It's a sad day at Columbia University"–Abraham Foxman, national director of the Anti-Defamation League; "Who would have thought that Columbia would make the U.N. look good?"–Joseph Potasnik, President of the New York Board of Rabbis).

24. Sally Falk Moore has suggested that there should be attention paid to the connection between semi-autonomous fields and the larger society. Moore, *supra* note 13, at 722-23. This might involve responses to laws of general application, those not intended to regulate the social field but which have an incidental effect on the relationships in that field. For example, the legal rules and institutional responses to claims of harassment, both sexual and racial, are not aimed at educational institutions. It is unlikely that any of these would have happened without a sea change created by the Civil Rights Movement and the Women's Movement and the demographic changes that are reflected in the presence of women and minorities in significantly larger numbers than ever before in colleges and universities.

25. There has been speculation that the attack on the World Trade Center was a "transformative moment" in the history of the United States. Other transformative moments may be the Civil War, the Great Depression/New Deal, and the Civil Rights Movement of the 1960s. The staying power of changes that take place in such a moment is open to question. The current attempt to undo the social legislation that

and standard like academic freedom should be subjected to a deliberate process of consideration. The recent addenda to the 1940 Principles are attempts to respond to change, but the collaborative process which was used in the promulgation of the 1940 Principles is missing in most cases.[26]

In a different political climate, one where the process of selecting judges was not tainted by partisan politics and demands for ideological conformity, there would be room here for a juridical approach. A jural drama, rather than a social drama, with its attendant rituals and symbolic content, might resolve current public controversies over academic speech.[27] The public might benefit from the kind of deliberation expected from a judge who sees precedent as something which speaks to or about a particular dispute, but also anticipates and provides for controversies that will arise in the future.

The unanimity of scholarly criticism of existing judicial decisions, however, cautions otherwise. Experts on academic freedom and the First Amendment complain that these decisions send mixed messages, promoting cognitive dissonance among those who expect symbols to match actions, an identity between the rhetoric and the result.[28] There is nothing but paradox and "general disarray" in the jurisprudence of academic freedom.[29] The confusion is all about constitutional law doctrines, not the application of the rules of interpretation in contract law, where the intent of the parties, not the intent of the Framers, is referenced.

Regulation or reglementation is best handled by those actors who are participants in "social arrangements in which there are

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was enacted during the New Deal is one example of the relationship between experience and changes in values or beliefs. The transformative event may displace entrenched beliefs only for the generation that experienced it.

26. *See supra* note 9 (providing a discussion of the differing levels of participation in the drafting of various statements).

27. The jural drama is, in Victor Turner's analysis, a space where there is "plural self scrutiny" and where the "ethical yardstick" of the participants is used to judge behavior. Turner, *supra* note 21, at 33-40. A legal proceeding is a "liminal space" in which the "symbolic idiom of the ritual process" may be used to justify a result but the rational idiom of the judicial process will be used to create and present a narrative. *Id.*

28. *See supra* note 1 (citing two articles providing such criticism).

29. Chen, *supra* note 1, at 958-59.

complexes of binding obligations already in existence."[30] Judges and politicians, academics and administrators do not have a problem with of cross-class communication, but that does not mean that they share the same expectations and professional standards. Judges and legislators are not in the business of educating the millions of students in the United States who attend colleges, universities, and professional schools. Judges should, and often do, defer to experts in the field of education, such as faculty, administrators, and the organizations to which they belong, organizations which created and which continue to interpret the 1940 Principles of Academic Freedom.[31] Legislators should do the same, and, with a few exceptions, most have.[32]

II. THE RELEVANCE OF THE PAST TO PRESENT CONTROVERSIES

Any consideration of the current controversies over academic freedom should include some attempt to discern patterns in behavior, ideas, and symbols utilized in these conflicts. If there is anything to be learned from past experience, those lessons should be applied in deciding how we might or should interpret the principle of academic freedom in contemporary social conflicts.

It is not difficult to create a simple typology of disputes which fall under the general heading of "academic freedom" and to list the various ways in which they have been handled. One

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30. Moore, *supra* note 13, at 723.

31. I am not suggesting that courts should stay out of cases where a faculty member has alleged a violation of law such as Title VII. It is unfortunate when courts do not scrutinize carefully the proffered explanations to determine whether they are pretextual instead of deferring uncritically to explanations of a tenure committee or the university board of regents. These generally are anti-discrimination cases, not academic freedom cases.

32. Conservative legislators feel compelled to introduce some form of the model legislation proposed by Horowitz or SAF, but this legislation usually dies in committee. *See* "Academic Bill of Rights" 2006, http://www.aaup.org/AAUP/GR/ABOR/aborstateleg.htm (last visited May 31, 2007) (providing a state-by-state description of proposed legislation). Students for Academic Freedom ("SAF") model statutes have been introduced in twenty-two jurisdictions. *Id.* The Georgia Senate adopted a resolution *recommending* observance of the Academic Bill of Rights. *Id.* In Ohio, the legislation was withdrawn when administrators of public colleges and universities issued a Joint Resolution of the Inter-University Council and the Association of Independent Colleges and Universities of Ohio. *Id.* In Colorado, the threatened legislation was abandoned after the presidents of the major public colleges and universities entered into a Memorandum of Understanding. *Id.* Despite these "successes," no such piece of legislation has ever been adopted as a law in any jurisdiction. *Id.*

species of contest concerns the qualifications of those who are entitled to teach in public institutions and whether a prerequisite to the right to teach is patriotism or loyalty to the nation. The controversies about membership in the Communist Party,[33] participation in an anti-war movement during the Vietnam era,[34] opposition to the invasion of Iraq or U.S. policy with respect to the Middle East[35] fall into this category. Each of these controversies in turn has involved behavior of faculty both inside and outside of the classroom.

What might surprise many outside of the academy is the second category, in which the principle of academic freedom is invoked in disputes about theory and knowledge in particular fields of study. Fights over the quality of scholarship may also be about subject matter, conclusions, methodology, or theoretical approaches to a subject area. The attacks on post modernist theories and critical theories of almost any kind, including, in legal academic scholarship, critical legal studies, race-crits, femcrits, and latcrits, are part of the debate about knowledge and truth. Such debates should be central to the inquiry we expect of scholars.[36]

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33. *See* Harold W. Stoke, *Freedom is Not Academic*, 20 J. HIGHER EDUC. 346, 348 (1949) ("The detection of communists should be accepted as a responsibility of the academic community itself. It should be no less the concern of faculties than of administrators, since the Communists intend the destruction of both. When Communists are detected, and sooner or later they reveal themselves, it is important that they be firmly and promptly expelled.").

34. *See, e.g.*, Franklin v. Leland Stanford Junior Univ., 218 Cal. Rptr. 228 (Cal. Ct. App. 1985) (affirming the judgment of the trial court denying reinstatement to a Stanford professor who was dismissed by the university for disruptive anti-war conduct that the university felt was in violation of its Policy on Appointment and Tenure).

35. The attacks on Ward Churchill and the Middle East Studies programs at Columbia fall into this category. *See supra* notes 19 and 20 and accompanying text.

36. *See* Larry Alexander, *Academic Freedom*, 77 U. COLO. L. REV. 883 (2006) (providing a thrilling example of a diatribe against liberalism and all of the social sciences and humanities). In this piece, Professor Alexander makes the claim that "[t]he marriage of identity politics–be it race, ethnicity, gender, sexual orientation, or disability–and silly post-modernism is the other major culprit in the de-academification of the academy." *Id.* at 890. The first major culprit is "the degree of political homogeneity in the academy." *Id.* at 889. *See also* Paul Campos, *Three Versions of Nonsense*, 77 U. COLO. L. REV. 901 (2006) (providing a commentary on Professor Alexander's article). Paul Campos, in agreeing with Professor Alexander's conclusion, summarizes this form of critique: "Alexander's claim, briefly stated, is that many of the things that pass for knowledge in the modern university are nothing more than nonsense." *Id.* at 901. According to Campos, Alexander believes that this has occurred because "post-modernism, at least in its cruder and more

Unfortunately, the emotions that such contests provoke can lead to name calling and purges. Those who offer a critique of law and legal institutions, which is labeled "critical legal studies," stood accused of nihilism.[37] Applying a label like nihilist or anarchist or communist, for that matter, is a way of dismissing whatever truth claims the scholars have made. The "love it or leave it" rhetoric we associate with questions of national loyalty deployed in these controversies blurs the line between loyalty to a nation and loyalty to a way of life, an intellectual tradition or cultural heritage. The second category collapses into the first.

Whether there are one or two categories, conflicts between faculty and the institutions at which they teach, or the public at large, can arise because of the conduct of faculty outside and inside the classroom. The professional values that are sometimes invoked, neutrality and objectivity, cannot be the standard against which behavior is measured when the very theories being debated contest the existence, utility, or consistent application of these standards in a particular discipline. A revised ethic of professionalism continues to move between two well-established values: freedom and responsibility. Responsibility resolves into questions of faculty classroom and research misconduct.

The decided tilt in the direction of responsibility, at least in terms of the ability of students and outsiders to demand an inquiry or investigation, is problematic. Equally troubling is the fact that this shift exacerbates rather than eliminates the underlying tension between new scholarship and old scholarship, between traditional sources and forms of argument and the counter hegemonic forms of discourse that have carved out a niche in the academy. It brings into sharp focus the problem of defining misconduct in the absence of professional ethics grounded in the triumvirate of absolutes: neutrality, objectivity

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extreme forms, has enabled all sorts of absurdities in the name of perspectivalism, historicism, anti-foundationalism, social constructionism, etcetera." Campos, *supra*, at 901.

37. *See* Paul D. Carrington, *Of Law and the River*, 34 J. LEGAL EDUC. 222, 227 (1984) ("The nihilist teacher threatens to rob his or her students of the courage to act on such professional judgment as they may have acquired."). Carrington does not suggest that there is no place for critical study, but that critical legal studies has no place in a law school that has "accepted responsibility for training professionals." *Id.* He argues that, unlike other scholarly settings, a law school's responsibility for training lawyers carries with it a corollary duty to "constrain teaching that knowingly dispirits students or disables them from doing the work for which they were trained." *Id.* This is a brutal attack on critical legal study.

and truth. If the search for truth has moved into unexplored territory, if we concede how hard it is to disentangle truth and ideology, what is the starting point or the means of orientation for those who seek to distinguish good and bad scholarship, good and bad teaching.

III. CLASSROOM MISCONDUCT AND STUDENT ACTIVISM

There are two species of complaints about classroom misconduct: those which are initiated by the conservatives (or fundamentalists) and those which come from the progressives on campus. The conservatives are best exemplified by David Horowitz, the prime mover behind Students for Academic Freedom ("SAF").[38] Horowitz and SAF are aligned with a niche academic freedom enterprise: Campus Watch, which surveils Middle East Studies programs at universities[39] and a much more amorphous group of conservatives who complain generally that faculty are too liberal, unpatriotic, or, in its most extreme form, allied with the enemies of the United States. Among progressives who do not take an absolutist position with respect to issues of speech, misconduct which implicates issues of academic freedom usually involves hostile environment claims. In these complaints, the faculty member is accused of making racist, sexist, anti-Semitic, or homophobic statements.

The alleged mobilization of students who claim to be oppressed because liberal faculty punish them for their

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38. *See* Mary Beth Marklein, *An Ex-liberal Navigates Right: Activist Defends Students from 'Leftist' Professors*, USA TODAY, June 1, 2006, at 1D (labeling Horowitz as the founder of SAF, an organization which the author describes as "a national organization that allows conservative students to vent"). On its website, SAF describes itself as a "clearing house and communications center for a national coalition of student organizations whose goal is to end the political abuse of the university and to restore integrity to the academic mission as a disinterested pursuit of knowledge." About SAF, http://cms.studentsforacademicfreedom.org//index.php?option=com_content&task=view&id=2&Itemid=5 (last visited May 31, 2007).

39. Campus Watch declares in its mission statement:

> Campus Watch, a project of the Middle East Forum, reviews and critiques Middle East studies in North America, with an aim to improving them. The project mainly addresses five problems: analytical failures, the mixing of politics with scholarship, intolerance of alternative views, apologetics, and the abuse of power over students. Campus Watch fully respects the freedom of speech of those it debates while insisting on its own freedom to comment on their words and deeds.

About Campus Watch, http://www.campus-watch.org/about.php (last visited May 31, 2007).

conservative views or who claim that their religious beliefs are not respected, is a simulated civil rights movement. One basic premise of the demand for the regulation of faculty–the ability of faculty to indoctrinate students–is disproved by the student complaints that SAF collects on its website.[40] The inability of faculty to persuade students of the legitimacy of an argument, the inaccuracy of a fact on which a student relies in making arguments, or the relative strength of sources is obvious in these criticisms. The issue joined in this debate is content–curricular content, content of lectures, or content of classroom discussions. In some cases, however, it may be a question of style, specifically the questionable attempts at humor by faculty.

Students who register complaints at the website for SAF are asked to label or describe the nature of their complaints. My personal favorites are "mocked political/religious figures" and "introduced controversial material."[41] In the latter case, there are very few topics that can be discussed in classes on political science, sociology, biology, world history, or law that would be without controversy. For that reason alone, the norms of academic freedom employ a standard of "relevance," that the material be germane to the subject matter taught in the course,[42] and completely reject the proposition advanced by SAF and others that controversy in the classroom should be prohibited or discouraged. Anyone who has been in teaching long enough knows that "germaneness" is a rule that permits or tolerates a great deal of improvisation. Faculty must employ ingenuity and creativity to introduce unanticipated events or circumstances into a discussion of course materials prepared weeks, months, or years before recent developments.

When the major political figures and the general population debate the teaching of "intelligent design" instead of or in

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40. *See infra* notes 47-52 and accompanying text (citing a few of the complaints on the website).

41. *See* Academic Bias Complaint Form, http://www.studentsforacademicfreedom.org/comp/complaints_form.asp (last visited May 31, 2007). Although the site provides the complaint option that reads: "introduced controversial material that has no relation to the subject," once the complaint is submitted, it is posted on the complaint center portion of the site under the description "introduced controversial material." *See, e.g.*, Complaint 528, http://www.studentsforacademicfreedom.org/comp/viewComplaint.asp?complainId=528 (last visited May 31, 2007).

42. *See* 1940 STATEMENT OF PRINCIPLES, *supra* note 3 (warning teachers to be careful when introducing controversial material that has "no relation to their subject").

addition to theories of evolution; when advances in medical technology raise issues about the beginning and end of human life; when lawyers and scholars cannot agree on the meaning or the application of international law to the U.S. invasion and occupation of Iraq, the use of torture, or the requirements of due process in a "war on terrorism"; democracy would be ill served by a policy that prohibits the discussion of controversial course material.

Education is linked not only to a notion of progress but also to democratic ideals. Fifty years ago, a university was defined as a community of scholars. Today a university is also a community of teachers. In the 1950s, human progress was said to depend on an intellectual "free enterprise system" and on the ability of universities to "capitalize the search for knowledge for the benefit of society."[43] Today, we believe that human progress also depends on our ability to educate students to prepare them for "civic engagement."[44]

There are other institutions that play a role in equipping students to solve the problems that confront them as individuals and as citizens in a democracy. Certainly, it is expected that most will rely on values they learn at home or in religious institutions to guide them through life. Institutions of higher education are not meant to replicate what goes on at home or in a church, synagogue, or mosque. The allegations of indoctrination or brainwashing are hyperbole, but students who attend an institution of higher education are likely to be exposed to ideas and information that are new to them. What they are taught in college is not just the subject matter covered in a particular course, but the ability to examine ideas critically and decide for themselves what is true and what is not.

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43. *See* RIGHTS AND RESPONSIBILITIES OF UNIVERSITIES AND THEIR FACULTIES (1953), *available at* http://www.aau.edu/reports/RRofU.html.

44. *See* Carol Schneider, *Greater Expectations and Civic Engagement*, LIBERAL EDUC., Fall 2002, at 2 (discussing the report entitled *Greater Expectations,* released by the Association of American Colleges and Universities and noting the public discourse created by that report's "call for a renewed commitment to education for civic engagement and ethical integrity"); ASS'N OF AM. COLLEGES AND UNIVS., GREATER EXPECTATIONS: A NEW VISION FOR LEARNING AS A NATION GOES TO COLLEGE (2002), *available at* http://www.greaterexpectations.org/pdf/GEX.FINAL.pdf. *Greater Expectations* calls on universities to develop "intentional learners." *Id.* at 21. These intentional learners are "responsible" in that they "help society shape its ethical values, and then live by those values." *Id.* at 23-24.

Perhaps the criticism of faculty that is most credible is the one which is labeled "mocked national political or religious figures."[45] If social policy or political action is the topic of discussion, the line between criticism of the behavior of actors responsible for such policies and the policy itself is often unclear. If a political actor would want credit for a policy–whether it is supply side economics or a preemptive war–both the actor and the policy may legitimately be criticized.

If the complaints on the SAF website about faculty "mocking" political figures in the period prior to and after the invasion of Iraq are accurate, faculty all over the country were angry about the war and angry about the election of George W. Bush. Many complaints concerned classes where the behavior of a political figure might be discussed because it was "germane" to the subject matter, one of the requirements of the 1940 Principles.[46] A faculty member in a class on "newswriting" could legitimately discuss a hunting accident involving the Vice President, especially if the Daily Show is a source of news for many people under the age of thirty. A student in such a class, however, complained that "the week after Cheney shot his friend the comments about Cheney just DID NOT stop."[47] No one can justify name calling, however, and several students reported that faculty called George W. Bush a "moron"[48] and a "bastard."[49] Additionally, a faculty member at a Christian university made students write "Darwin is a loon" on all assignments.[50] None of these could be justified in terms of academic freedom.

The term "mocking" suggests an attempt at humor, for

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45. *See supra* note 41 and accompanying text.

46. *See supra* note 42 and accompanying text.

47. Complaint 618, http://www.studentsforacademicfreedom.org/comp/viewComplaint.asp?complainId=618 (last visited May 31, 2007).

48. Complaint 476, http://www.studentsforacademicfreedom.org/comp/viewComplaint.asp?complainId=476 (last visited May 31, 2007).

49. Complaint 289, http://www.studentsforacademicfreedom.org/comp/viewComplaint.asp?complainId=289 (last visited May 31, 2007) ("He would continuously make references that President Bush is one of the 'top ten bastards that have ever walked the face of this earth.'"); Complaint 622, http://www.studentsforacademicfreedom.org/comp/viewComplaint.asp?complainId=622 (last visited May 31, 2007) ("continuously refers to president Bush as a 'bastard' and says that reagan and bush are "'stupid'").

50. Complaint 393, http://www.studentsforacademicfreedom.org/comp/viewComplaint.asp?complainId=393 (last visited May 31, 2007) ("Was repeatedly forced to repeat 'darwin is a loon' on all assignments. Any arguments presenting evidence of evolution were denounced as 'Satanism.'").

ridicule is a form of humor. Faculty members believe that humor is an effective strategy in the classroom. Make them laugh, and teaching evaluations are positive; make them laugh, and it may be possible to discuss difficult issues; make them laugh, and they will remember the experience, and perhaps the material, you were discussing that day. This desire to entertain is what gets faculty into trouble.

Political commentary often is expressed as humor. In a course on American Democracy, one could legitimately question the manner in which we elect the President of the United States. A faculty member teaching that course apparently illustrated the point by writing "Bushisms" on the board.[51] It might be more of a stretch, however, if in a class on dinosaur extinction, a faculty member uses pictures of Harriet Miers, Karl Rove, Bill Frist, John Kerry, and Al Gore to illustrate the difference between "bad genes" and "bad luck" in the process of extinction. Similarly, a student did not find it funny when a faculty member wrote letter grades on the board followed by percentages. When there were no As and Bs, the students panicked until the faculty member told them, "Oops these are not your grades. These are the grades that President Bush received at Yale." [52]

Given the obvious penchant for off the cuff remarks about the current administration on the part of some who might be labeled "liberal academics," those liberals have no ground for complaint when someone like Douglas Feith stands up in front of his class and claims that communism is dead "everywhere outside of the American universities."[53] He tells his students it is a joke.[54] It is not a joke for anyone who remembers loyalty oaths and the termination of tenured faculty who had been or were members of the Communist Party or who refused to answer questions about their political affiliation.[55]

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51. Complaint 231, http://www.studentsforacademicfreedom.org/comp/viewComplaint.asp?complainId=231 (last visited May 31, 2007) ("He makes fun of the way Bush speaks and enjoys writing 'Bushisms' on the board whenever possible.").

52. Complaint 311, http://www.studentsforacademicfreedom.org/comp/viewComplaint.asp?complainId=311 (last visited May 31, 2007).

53. Audio tape: Feith Takes Iraq Policy Debate to Georgetown (Apr. 19, 2007), *available at* http://www.npr.org/templates/story/story.php?storyId=9678499 (last visited May 31, 2007).

54. *Id.*

55. *See* Davis v. Univ. of Kansas City, 129 F. Supp. 716, 718 (W.D. Mo. 1955) ("And the refusal of a teacher–in a most intimate position to mould the minds of the youth of the country–to answer to the responsible officials of the school whether he is

Most of the statements made in class reveal something about the way the teacher thinks about teaching. A classroom is not the public sphere that you might think. It is an intensely private sphere, a place where a relationship is built up between the person in the front of the room and those who are seated before him or her. Sometimes faculty act on this sense of intimacy, taking liberties and making statements that they would never make outside the classroom.

These complaints should make us re-examine the liberties we take in the classroom and the kind of humor we use to make our points, legitimate as they might be. But while self-reflection and good taste are wanting and perhaps should be encouraged, nothing in these complaints really rises to the level of misconduct that should result in termination of employment. The fact that any student, conservative or Republican during the Bush administration or progressive or liberal during the Clinton administration, is unhappy because a joke is made about the intelligence (or morality) of a sitting President is not a violation of anyone's civil rights or evidence that "brainwashing" or "indoctrination" is taking place.

Educational institutions feel differently about jokes that insult a group to which the student belongs or a belief that is central to the student's identity. For some students it is faith, for others it may be race, gender, ethnicity, or sexuality.[56]

Academic freedom is not a license for behavior that is abusive. Many liberals and progressives have chosen to abandon an absolutist approach to free speech. It is difficult to defend an

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a member of a found and declared conspiracy by a godless group to overthrow our government by force, constitutes 'adequate cause' for the dismissal of such a teacher.").

56. One student objected when a faculty member teaching *Hustler v. Falwall* allegedly said, "Falwell is an in-your-face evangelist who said that 9/11 was the fault of gays and lesbians, and other crazy things." Complaint 356, http://www.studentsforacademicfreedom.org/comp/viewComplaint.asp?complainId=356 (last visited May 31, 2007). He said that Falwell (a religious figure under the SAF classificatory scheme) was a "poster boy for the Bush Administration and the religious right." *Id.* In a criminal law class, a professor ad libbed (no doubt) a hypo involving brother and sister rock climbers. According to the complaint, the faculty member said, "[T]he brother would be on top of the sister" and, after seeing the potential for humor, continued, "Hmm. Sounds like the South." Complaint 265, http://www.studentsforacademicfreedom.org/comp/viewComplaint.asp?complainId=265 (last visited May 31, 2007). A student, who was from the South, was offended and confronted the professor after class. *Id.*

uncritical approach to speech in the face of overwhelming proof that speech is an integral part of the process of subordination and oppression. If invidious discrimination is rejected and if there is a commitment to the politics of inclusion, then something must be done about the kind of speech that creates a "hostile environment." While speech codes were emphatically declared to be unconstitutional in a number of cases,[57] universities continue to respond in cases of discriminatory speech. In those cases where racist or sexist speech is an issue, the question of intent or motive is relevant. In judging motive, there are a number of different factors which are relevant: was this a gratuitous use of racist or sexist remarks; was it a case of insensitivity born of ignorance or deliberate indifference; was it directed at a particular student or group of students; and was there a legitimate pedagogical purpose?

At the University of Wisconsin Law School, a legal process faculty member used stereotypes about the Hmong to illustrate a lecture on the relationship between law and culture, more specifically, the possibility of a cultural defense to a charge of rape.[58] From the reported facts in the case, it appears that there was insensitivity but there was arguably also a legitimate pedagogical purpose and no intent to demean or embarrass members of the Hmong group. The faculty member did not lose his job, but there was an acknowledgement that the speech was inappropriate.[59] At UCLA Law School, it was not faculty but fellow students who created a discriminatory hypothetical for a Moot Court competition. The hypothetical featured a villain, El Guapo, who was convicted of "continuous sexual abuse of a child," re-entered the U.S. illegally from Mexico at Beefeater (Gin), was interviewed by a federal agent called Jack Daniels (Whiskey), and was tried in the state of Patrón (Tequila).[60] The Moot Court board

57. *See* Dambrot v. Cent. Mich. Univ., 55 F.3d 1177 (6th Cir. 1995); Bair v. Shippensburg Univ., 280 F. Supp. 2d 357 (M.D. Pa. 2003); UWM Post, Inc. v. Bd. of Regents of the Univ. of Wis. Sys., 774 F. Supp. 1163 (E.D. Wis. 1991); Doe v. Univ. of Mich., 721 F. Supp. 852 (E.D. Mich. 1989); Mark A. Graber, *Does it Really Matter? Conservative Courts in a Conservative Era*, 75 FORDHAM L. REV. 675, 695 (2006) ("Whenever a court has ruled on the constitutionality of a college speech code, the policy has been declared unconstitutional.").

58. Anita Weier, *Law Prof Denies 'Hateful' Statements About Hmong*, CAPITAL TIMES, Mar. 6, 2007, at A1.

59. *See id.* (noting the dean's recognition that the professor's comments were "deeply hurtful" and his apology for the professor's comments).

60. *See* Letter from the UCLA Moot Court Executive Board to the Fall Moot Court

was not punished, but they did issue an apology and modified the problem.[61] In both cases, the speakers denied any intent to injure or harm the affected group. One can imagine how stereotypes derived from pervasive anti-immigrant sentiment in contemporary political discourse might have manifested, probably unconsciously, in these attempts at humor by faculty and students. Humor is often improvisational or spontaneous rather than well thought out. Therein lies the danger.

The cases which are more troubling because there may be no apology or even acknowledgement that an injury occurred are the hostile environment claims of gay and lesbian students. At the University of Nevada, Las Vegas, Hans Hoppe, an economics professor, expounded on his time preference theory, using homosexuals as an example of a group that does not plan for the future.[62] According to Hoppe, the gay person is an archetypical single whose need for immediate gratification is attributed to the fact that gays do not have children and live riskier lifestyles.[63] The student's claim was a "hostile environment"[64] claim, but there is no recourse against insensitivity or prejudice dressed up as theory. Unless the faculty member steps over the line between marginally credible theory and unjustifiable rant, the academic equivalent of a Michael Richards-like melt-down,[65] there is no penalty for "pluralistic ignorance."[66]

Competition Participants (Oct. 1, 2006), *available at* http://www.equaljusticesociety.org/email/2_moot_court_problem.pdf (providing the original moot court problem).

61. *See* Letter from the UCLA Moot Court Executive Board to the Fall Moot Court Competition Participants (Oct. 12, 2006), *available at* http://www.equaljusticesociety.org/email/3_moot_court_board_response.pdf (recognizing that their attempt at levity resulted in a "poorly considered treatment of serious issues of race and ethnicity," and providing a new problem).

62. Richard Lake, *Lecture Causes Dispute*, LAS VEGAS REV.-J., Feb. 5, 2005, at 1A.

63. *Id.*

64. *See* Letter from Raymond W. Alden, III, Provost of UNLV, to Professor Hans-Herman Hoppe (Feb. 9, 2005), *available at* http://www.mises.org/pdf/hoppeletter.pdf (noting that the formal complaint alleged that Professor Hoppe's lectures "created a hostile or intimidating educational environment in violation of the University's policies regarding discrimination as to sexual orientation").

65. Michael Richards' now infamous rant at a comedy club was precipitated by hecklers. Paul Farhi, *"Seinfeld" Comic Richards Apologizes for Racial Rant*, WASH. POST, Nov. 21, 2006, at C1. Offended at what he thought was disrespect by audience members, Richards proceeded to call them the "N" word and to suggest that they might have been lynched in the past for their conduct. *Id.*

66. The late Dwight Green used this term to describe not just the absence of knowledge but also the existence of "false social knowledge" of one social group by another. Dwight L. Greene, *Abusive Prosecutors: Gender, Race, & Class Discretion*

For some of us, Hoppe's conservative/libertarian political philosophy is a dystopic vision, but for Hoppe's allies at the Ludwig von Mises Institute, he is "a radical thinker and system builder of the sort that academia should treasure."[67] Certainly, the conclusion of the much maligned Provost at UNLV–that Hoppe's theories had no support in juried journals or that he was characterizing opinion as fact–has some support.[68] The assumptions on which Hoppe's theory is built are disproved by the social reality of which he must be aware: the political activism expressed in lobbying for and litigation about the rights of gay people to marry or to have civil unions that accord them the same rights, privileges, and responsibilities as married couples. While many of us might see this as a serious deficiency, a lack of attention to facts that seems irresponsible, the vetting of theory is something which can and should take place in the review of scholarship, before it gets to the classroom. Otherwise, a commitment to academic freedom constrains our regulatory impulse.

Still, there is no doubt that hostile environment issues have currency, which is why the newer statements on academic freedom address issues of faculty responsibility.[69] Civility is the

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and the Prosecution of Drug-Addicted Mothers, 39 BUFF. L. REV. 737, 765 (1991).

67. Stephan Kinsella & Jeffrey Tucker, *The Ordeal of Hoppe*, FREE MARKET, April 2005. Kinsella and Tucker advocate for Professor Hoppe's academic freedom, warning that "[w]hat is at stake is the integrity of the university learning environment itself." *Id.*

68. *See* Letter from Raymond W. Alden, *supra* note 64 ("I find that the grievance is hereby affirmed. This finding is based on the unanimous report of the grievance panel. They specifically determined that purportedly empirical statements in your lectures regarding homosexuals and time preferences were not supported by peer-reviewed academic literature. These statements of alleged fact had the effect of being discriminatory and creating a hostile learning environment because they were not qualified as opinions, theories without experimental/statistical support, topics open to debate, or otherwise limited."). The President of the University, however, seemed to take a different view in declaring the entire matter closed. *See* Statement of Dr. Carol Harter, President of UNLV, regarding Hans-Hermann Hoppe (February 18, 2005), *available at* http://www.mises.org/pdf/harterstatement.pdf. According to the president, professors are "entitled the freedom to teach theories and to espouse opinions that are out of the mainstream or are controversial." *Id.* To her, when balancing between freedoms and responsibilities, "academic freedom must, in the end, be foremost." *Id.*

69. *See, e.g.*, ASS'N OF AM. COLLEGES AND UNIVS., ACADEMIC FREEDOM AND EDUCATIONAL RESPONSIBILITY 1 (2006), *available at* http://www.aacu.org/about/statements/documents/academicFreedom.pdf (noting that the responsibility of faculty for educational programs is a dimension of academic freedom that was not developed well in the original principles).

norm governing the conduct of faculty and students. One of the real risks in the attempt to legislate academic freedom for students is that the legislation interferes with the ability of faculty to place limits on a disruptive student or to demand courtesy and respect from students who are participating in a class.

In early speech code cases, the juridical opposition was set up between freedom and equality.[70] Slightly less than twenty years later, the rationale for government intervention, however, is not a conflict between principles of equality and speech, but a conflict between competing civil rights claims. In North Carolina, the federal government intervened when a student claimed that his rights as a Christian were infringed.[71] Similarly, in Missouri, a young woman filed a complaint in federal court because she felt that her rights as a Christian were infringed.[72] In both cases, the students felt that their faith required them to object to the sexuality of those who are gay or lesbian. In North Carolina, the student opined during a class discussion that homosexuals were "disgusting."[73] In Missouri, the student objected when she was asked to draft a letter in support of gay marriage.[74]

These cases are not about academic freedom, but religious freedom. Academic freedom is not about the right to believe or embrace a particular theology. Academic freedom is about the freedom to question and to investigate ideas. A religious

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70. *See, e.g.*, Doe v. Univ. of Mich., 721 F. Supp. 852, 853 (E.D. Mich. 1989) ("It is an unfortunate fact of our constitutional system that the ideals of freedom and equality are often in conflict.").

71. *See* George Archibald, *Discrimination Against White Male Found: Accused of Using 'Hate Speech,'* WASH. TIMES, Sept. 24, 2004, at A1 (reporting on the U.S. Education Department's Office of Civil Rights' ruling that an English professor at the University of North Carolina subjected a student to "intentional discrimination and harassment" after the Christian student stated that he was disgusted by homosexual behavior).

72. *See* Mará Rose Williams, *University Settles Student's Lawsuit: An MSU Graduate Alleged that a Professor had Violated Her First Amendment Rights*, KANSAS CITY STAR, Nov. 11, 2006, at B4 (reporting that a settlement was reached whereby the university agreed to compensate the student and that the accused professor voluntarily agreed to resign as the master of the social work program while remaining at the university).

73. *See* Archibald, *supra* note 71 (noting that in response to a classroom discussion of whether heterosexual males were threatened by homosexual men, the student responded that he felt disgusted instead of threatened).

74. *See* Williams, *supra* note 72 (reporting that the student refused to sign the letter because it was against her Christian beliefs).

argument about what is true or right is not a matter of academic freedom. It is a matter of religious freedom. A person of faith who attends a university should expect that his or her faith will be tested because of the questions that are raised, the information that is presented, or the discussions that occur in the classroom as well as in the assignments and the instruments of assessment. That is what faith is all about. You believe in spite of other information that is inconsistent with your beliefs. The belief does not have to be verifiable or empirically demonstrable.

Whether religion gives anyone a right to insult someone else is a different question all together, and it is not about academic freedom either. There is no academic freedom to insult people. It is not a license to call someone "disgusting"[75] or to demand that course materials conform to a particular religious tenet. It is a matter of some interest that the Department of Education would find that a faculty member had violated the civil rights of the student by chastising him for the way he made his argument and for the use of terms which were insulting to and disturbing to his classmates.[76]

There is no doubt that the professor's email went further than simply chastising the student for his speech when she claimed that the student was exercising his "white, heterosexual, Christian male privilege" in her class.[77] I do not think, however, that any critical scholar would disagree with this characterization. The content of the faculty member's email did not use a stereotype traditionally used to demean or humiliate a group and the members of that group. She did not use an epithet associated with the persecution of Christians. Her email simply indicated that, while the student thought that he was entitled to act as he pleased, she was the person in charge. She exercised what she thought was her power to do as a faculty member and she used the language of her discipline and the course she was

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75. *See supra* note 73 and accompanying text.

76. *See* Archibald, *supra* note 71 (quoting the email sent by the professor to the class chastising the student for his in-class remarks: "What we heard Thursday at the end of class constitutes 'hate speech' and is completely unacceptable, it has created a hostile environment").

77. *Id.* The email reads: "What we experienced, as unfortunate as it is, is, however, a perfect example of privilege, that a white, heterosexual, Christian male, one who vehemently denied his privilege last week insisting that he earned all he has, can feel entitled to make violent, heterosexist comments and not feel marked or threatened or vulnerable is what privilege makes possible." *Id.*

teaching: "Literature and Cultural Diversity."[78] She was disabused of this notion when the student was able to enlist the power of the federal government to punish her. The student humbled that faculty member, turning the tables and demonstrating that she was wrong. He could exercise white male Christian privilege and furthermore, she was powerless to stop him. Moreover, in stark contrast to the treatment of Hans Hoppe, a theoretical perspective in a particular discipline was condemned as discrimination.

In response to the controversy surrounding the incident in Missouri, the Missouri House of Representatives passed a bill that, if enacted, would be known as the Emily Brooker Intellectual Diversity Act.[79] Among those who have spoken out against this bill is Stanley Fish, never one to embrace an absolutist approach to free speech in any event.[80] Fish does this by creating a distinction between advocacy, which is not protected, and the right to explore an idea, which is.[81] He was

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78. *See* Scott Carlson, *North Carolina Instructor's E-Mail on 'Hate Speech' Prompts Investigation*, CHRON. OF HIGHER EDUC., Apr. 9, 2004, at 12 (discussing the events surrounding the initial investigation by the U.S. Department of Education).

79. *See* H.B. 213, 94th Gen. Assem., Reg. Sess. (Mo. 2007), *available at* http://www.house.mo.gov/bills071/biltxt/perf/HB0213P.HTM (requiring every public institution in Missouri to issue an annual report detailing their efforts to "ensure intellectual diversity and the free exchange of ideas"). The Act would be named after Emily Brooker, the student who filed the complaint against Missouri State University. Williams, *supra* note 72. A substitute bill by the Missouri Senate, which altered much of the language contained in the House bill, is currently pending in the Senate. *See* Senate Committee Substitute for H.B. 213, 94th Gen. Assem., Reg. Sess. (Mo. 2007), *available at* http://www.house.mo.gov/bills071/biltxt/senate/0462S.09C.htm.

80. *See* STANLEY FISH, THERE IS NO SUCH THING AS FREE SPEECH, AND IT'S A GOOD THING TOO (1994). In the title chapter of this book, Fish argues that free speech is not an "independent value," but is instead a "political prize." *Id.* at 102-19. It is never invoked by those who are politically opposed to an individual that has captured the "prize." *Id.* at 102. In other words, "the label 'free speech' is the one you want your favorites to wear." *Id.*

81. *See* Stanley Fish, Op-ed, *Advocacy and Teaching*, N.Y. TIMES, Mar. 24, 2007, at A13 [hereinafter Fish, *Advocacy and Teaching*]. According to Fish, the problem at Missouri State University was not in the issue presented in the assignment but was instead the content of the assignment–advocacy. *Id.* The right of homosexuals to marry can certainly be an issue discussed in the classroom; advocacy, however, should not be "going on" in the university. *Id.* If there is no advocacy, the controversy is removed because the beliefs of the student and teacher become irrelevant, and the focus returns to analytical skills and academic performance. *Id.* Missouri's proposed bill would be irrelevant if this "distinction between studying and advocating were honored." *Id.* Specifically, there would be no need for the provision dealing with "conflicts between personal beliefs and classroom assignments." *Id.*

talking, of course, about the speech of faculty, not the speech of students, but in either case, I am not sure the distinction works.

The distinction between studying an idea and recruiting students "for the political agenda it may be thought to imply"[82] has superficial appeal. The problem with this distinction is that it does not comport with what we know about customs in the academy. Every scholar who comes up with what he thinks is a great new idea wants to recruit adherents. In fact, in describing the origins of the university, the Association of American Universities noted that students seek out great scholars.[83] Certainly, that is what graduate school is about. If scholars did not look for acolytes, those who were willing to embrace a theory and honor the person who created it, what would be the recompense in the underpaid teaching profession? How would most major research projects be conducted? Who would do the grunt work of collecting data and reading and culling the literature in the field? Fame (something which Stanley Fish probably takes for granted), or some degree of recognition within our field, is what we all hope for, and students are the means to that end.

Nor is it self-evident that advocacy in the classroom is wrong. If it is inappropriate for a faculty member to use a letter to a congressman as an assessment tool (apparently the letters were not actually mailed, although I am not sure this was made clear to Ms. Brooker),[84] what about the traditional curricular requirement for first year law students who must write appellate

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(citing H.B. 213, 94th Gen. Assem., Reg. Sess. (Mo. 2007)). *See also* Stanley Fish, Op-ed, *Conspiracy Theories 101*, N.Y. TIMES, July 23, 2006, at A13 [hereinafter Fish, *Comspiracy Theories*] (discussing the criticism of University of Wisconsin at Madison lecturer Kevin Barrett after Mr. Barrett acknowledged that he had discussed with his students his strong view that 9/11 was an inside job of the U.S. government). Again, Fish urges university officials to draw a distinction between academic study and advocacy:

> Any idea can be brought into the classroom if the point is to inquire into its structure, history, influence and so forth. But no idea belongs in the classroom if the point of introducing it is to recruit your students for the political agenda it may be thought to imply.

Id.

82. Fish, *Conspiracy Theories*, *supra* note 81.

83. *See* RIGHTS AND RESPONSIBILITIES, *supra* note 10 ("Great scholars and teachers drew students to them, and in the Middle Ages a few such groups organized themselves into the first universities.").

84. *See* Fish, *Advocacy and Teaching*, *supra* note 81 (indicating that the letter that was to be forwarded to the state legislature was never sent).

briefs in support of decisions that they may find indefensible on moral grounds? Law schools believe that thinking about arguments from both sides makes for better advocates in an adversarial legal system. Critics believe students who are taught this way lose sight of what is right and what is wrong; they lose their moral bearings, and the only morality left is "zealous advocacy."[85] In either case, an assignment that asks students to write a logical and forceful argument for a position which he or she would not ordinarily take is a learning experience.[86] In the end, the process may simply reinforce the student's original assessment of the better argument in a particular case.

Students at many law schools must provide a number of hours of service to indigent clients as a condition for graduation. When the school at which I teach adopted this pro bono requirement, students leafleted and protested claiming that a pro bono requirement was involuntary servitude. Their argument led to the creation of two courses which could partially satisfy the pro bono requirement, both designed so that law students would learn why it is that lawyers have a duty to represent those who might not be able to afford an attorney. The courses were Rights of the Poor and Race and American Law.

Given the purpose of the course on Race and American Law, the choice of instructor was important. The entire purpose of the course on Race and American Law would be defeated if the person teaching it had a different agenda, a theory that poor people or black people were undeserving, that the root of their problems was their failure to subscribe to middle class values, or that it is rational and reasonable for police officers to suspect that black men have committed some crime. And yet a tax professor whose theories on these subjects were well known asked to teach

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85. *See, e.g.,* Erwin Chemerinsky, *Pedagogy Without Purpose: An Essay on Professional Responsibility Courses and Casebooks,* 1985 AM. B. FOUND. RES. J. 189, 192-94 (questioning the adherence to the teaching of the "fundamental duty" of zealous representation in legal ethics courses). Chemerinsky believes that a legal ethics course should, instead, "encourage students to think at the 'macro' level about the role of the lawyer in society and at the 'micro' level about the way the student wants to spend his or her career." *Id.* at 194.

86. *See* Deborah Waire Post, *Teaching Interdisciplinarily: Law and Literature as Cultural Critique*, 44 ST. LOUIS U. L.J. 1247, 1254-55 (2000) (discussing how life experiences of students affect their ability to see or appreciate the other side of an argument and noting the importance of gaining the ability to distinguish between seeing the arguments that can be made from another perspective and embracing that perspective).

the course and claimed that his academic freedom had been abridged when his request was denied.[87]

Pro bono requirements are justified pedagogically because lawyers are instructed in law school about their ethical obligations.[88] Pedagogically, it is important to my school to make sure that the course materials in Race and American Law illustrate the important role that lawyers play in advancing civil rights and eliminating discrimination. Neither the decision to include the course and to dictate its contents nor the decision about who was best suited to teach it was a violation of anyone's academic freedom. The law school acted within its prerogatives to decide on the content of the curriculum and the identity of those who would teach the course.

We teach law students about their ethical obligations for a variety of reasons. A license to practice law is a privilege. If the legal system in this country is adversarial, its legitimacy is jeopardized unless all participants have adequate representation. There is both self-interest as well as political and ideological content in this obligation to provide pro bono services. The same could be said of the clinics which offer services to various communities in and around law schools. Generally, the subject matter of the clinics is directed at the needs of the classes of people who are likely to be unable to afford an attorney.

The 1940 Principles, as amended, severely limit the ability of the institution to punish faculty for the theories they advance in the classroom, no matter how strange or flakey these theories may appear. Recent intervention by the federal and state governments, however, suggests that this may soon be altered.

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87. *See* DAN SUBOTNIK, TOXIC DIVERSITY: RACE, GENDER, AND LAW TALK IN AMERICA xiii (2005) (giving the faculty member's account of the dispute). *But see* Clark v. Holmes, 474 F.2d 928, 931 (7th Cir. 1972) (stating that there is no basis for the argument that academic freedom would allow a faculty member to "override the wishes and judgment of his superiors and fellow faculty members as to the proper content" of a course).

88. For a discussion of ethical standards and the "normative" aspects of a lawyer and law professor's duties to ensure that there is equal justice and to undertake the representation of those who are "unpopular clients," see Judith L. Maute, *Changing Conceptions of Lawyers' Pro Bono Responsibilities: From Chance Noblesse Oblige to Stated Expectations*, 77 TUL. L. REV. 91 (2002); Robert R. Kuehn, *A Normative Analysis of the Rights and Duties of Law Professors to Speak Out*, 55 S.C. L. REV. 253 (2003). While the norms that govern the conduct of lawyers have been contested, the position taken by dissidents has not been adopted. *See id.* at 286 (discussing the critiques offered by Professors Timothy P. Terrell and James H. Wildman).

In the two cases discussed above, the irreparable harm that is done by such intervention is obvious. Rather than eliminating bias, the government has intervened to require presentation of a particular viewpoint. Under the Missouri House Bill, legislation that clones the model statutes proposed by David Horowitz, the university is encouraged to record and report the identity and the viewpoint of outside speakers.[89] In addition, the university is told that it may include in its annual report the efforts made to incorporate intellectual diversity concerns in the development of programs.[90] Specifically, the bill refers to concerns of religious freedom and "the viewpoint that the Bible is inerrant."[91] I am not sure what that means. The university must treat the Bible as though it were fact rather than a matter of faith? Once again, the government is attempting to limit scholars from freely going where their research leads them. The state says that the Bible is an authority that must have equal standing in the classroom no matter what subject is under discussion or consideration.

IV. RESEARCH MISCONDUCT AND ACADEMICS AS PUBLIC INTELLECTUALS

The university is a place where learning takes place inside and outside of the classroom, where ideas are exchanged in activities organized by students and faculty, and where faculty often are featured speakers at public fora to which the broader community is invited.[92] Faculty write specialized articles for consumption by readers within narrow or specialized fields and they write essays and opinion pieces for consumption by the general public.

The university is a place where ideas take shape before they are introduced into the public discourse, before they become part

89. *See* H.B. 213, 94th Gen. Assem., Reg. Sess. (Mo. 2007), *available at* http://www.house.mo.gov/bills071/biltxt/perf/HB0213P.HTM (stating that the annual report may include a description of the steps taken to "[e]ncourage a balanced variety of campus-wide panels and speakers and annually publish the names of panelists and speakers").

90. *Id.*

91. *Id.*

92. This is my definition of a public intellectual. It is not that of Judge Richard Posner who has a theory about everything and who now uses quantitative methods (how many times a name appears in the press) to decide who is and who is not a public intellectual. *See* Arthur Austin, *The Law Academy and the Public Intellectual*, 8 ROGER WILLIAMS U. L. REV. 243 (2003) (providing a discussion of Posner's book and the role of law professors as public intellectuals).

of a much wider political discussion. Social movements and ideological conflicts show up on campus because both students and faculty are engaged with ideas, with critiques of social, political and economic conditions, and with theories of human behavior.

One of the anomalies that exists with respect to academic freedom is that public speech by academics is seldom the basis for termination of employment. Perhaps because of real First Amendment issues, faculty are free to comment on current political events. If there is a price to be paid for public utterances, the case for punishment must be made in terms of a faculty member's performance of her job. When public advocacy leads to a re-evaluation of scholarship, the standard shifts to "research misconduct." I am not clear as to why this should be so, except that the Interpretive Comments to the 1940 Principles say that the entire body of work of a scholar should be taken into consideration in deciding how to handle controversies over public statements.[93]

Those viewing the process from the outside do not see the necessity of internally reviewing the scholarship of an individual who has said something they believe to be outrageous. Outsiders know what the bad act was and they believe they know what the consequences must be. Those of us on the inside, however, find comfort in the fact that we are judged not by what we say extemporaneously in a public meeting, but by our written work and our record of publications. In written work, outrageous theory is hemmed in by requirements of empirical data, logic, or authority. Conformity to some notion of proper scholarship is guaranteed by the tenure process.

There is a contest in the academy, of course, over the content of particular courses and entire fields of study, the manner in which courses are taught, and the identity of the people who are taught and those who teach them. This particular political struggle is delegated to those who evaluate faculty for tenure and, more specifically, to the colleagues in the field who make judgments about the quality of scholarship. Because we acknowledge explicitly the political nature of academic inquiry, we embrace standards of excellence that are internal to the

93. *See* 1940 STATEMENT OF PRINCIPLES, *supra* note 3 (stating in the 1970 Interpretive Comments that any dismissal decision should "take into account the faculty member's entire record as a teacher and scholar").

specific field in which a scholar works and a policy of academic freedom which constrains the process of evaluation. Leaning too far in the direction of standards, often measured in terms of what is known and accepted, poses a risk to new and innovative thinking. Leaning too far in the direction of freedom undermines the legitimacy of an institution that puts its imprimatur on shoddy work.

The ideological opposition expressed in theoretical debates can be intense. Fortunately, this is not a matter with which the government or private citizens are concerned. When issues are raised about the public statements of faculty, there is often an element of mass hysteria. When individuals, radio talk show hosts, television personalities, and bloggers go to work mobilizing alumnae and the general public, a presumption should operate in favor of the faculty member. Specific media outlets make no pretense of neutrality. If they do, no one believes that they are truly "no spin" zones. Misinformation and disinformation are disseminated as often, or more often, than complete and accurate reports of events, activities, or speeches. Accusations made on shows featuring talking heads who end up screaming at each other or invited guests who are not allowed to complete their sentences should not be taken seriously. If a faculty member is the focus of such intense media scrutiny, no decisions should be made by an administration about the future of that person. The burden of proof is on the accusers to produce something more than a quote taken out of context or a cell phone video clip on YouTube. Unsubstantiated allegations of misconduct should not be sufficient because misconduct in these contexts often amounts to the expression of unpopular ideas.

The opposition of the faculty at Georgetown to the employment of Douglas Feith[94] and the steps taken to terminate Ward Churchill by the University of Colorado[95] are only two very

94. *See* Steve Goldstein, *Life in Academia for a Planner of Iraq War*, PHILADELPHIA INQUIRER, Jan. 29, 2007, at A1 (discussing the "mini-ruckus" that occurred amongst Georgetown faculty, administrators, and students after the university hired Feith, a former Pentagon official under President George W. Bush). A similar controversy arose when Columbia University refused to hire Henry Kissinger after Watergate and the Vietnam War. *See, e.g.*, Fred W. Friendly, *Kissinger: Victim of Liberal "Witch Hunt" at Columbia?*, U.S. NEWS AND WORLD REPORT, June 13, 1977, at 33.

95. *See* Christopher N. Osher, *Churchill Part of Bigger Fight: Many Have a Stake in the Outcome of the CU Professor's Case*, DENVER POST, May 30, 2007, at B1 (discussing the latest actions taken in the decision to fire Churchill). As of the time

public examples of the polarization that exists in this country over the Iraq War. To put this opposition in the most simplistic terms, there are those who believe that the United States should act to establish and maintain its status as the world's only superpower, and there are those who believe the United States has violated international law and ignored the requirements of our own Constitution. There may be reasons for considering the role faculty played in the prosecution of unethical or illegal conduct in deciding whether to make an initial hiring decision. Advocacy after one is tenured, no matter how repugnant to one's colleagues, is generally not a basis for termination of employment.

If academic freedom is to have any substance at all, it should mean that there are very few rules constraining the public debate over government policies like the invasion of Iraq. Unfortunately, the case of Ward Churchill set the worst possible precedent. It was Ward Churchill's comments about 9/11 which precipitated a tidal wave of complaints about him and his work.[96] Everyone who ever had a grievance of any kind suddenly appeared with some allegation of wrongdoing on his part. Academics who were offended by his argument that the army intentionally delivered smallpox laden blankets to the Indians raised issues about the quality of his scholarship,[97] and old smoldering hostilities over who wrote what first burst into flames.[98] The Ward Churchill case was a circus in the academy and the media. A university-wide committee was constituted to investigate the allegations.[99]

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of this article, the ultimate decision to fire Churchill was still pending. Osher, *supra*, at B-1.

96. *See* Reid, *supra* note 20 (discussing Ward Churchill's comments about 9/11 and the public outcry that resulted).

97. *See* CHURCHILL REPORT, *supra* note 20, at 39. Allegation D examined by the committee concerned "Professor Churchill's claims that the U.S. Army deliberately spread smallpox to Mandan Indians living near Fort Clark in what is now North Dakota in 1837, using infected blankets taken from a military infirmary in St. Louis." *Id.* The complaint that led to the investigation alleged fabrication and misrepresentation of sources. *Id.* As to this allegation, the committee found "by a preponderance of the evidence a pattern of deliberate academic misconduct involving falsification, fabrication, and serious deviation from accepted practices in reporting results from research." *Id.* at 82.

98. *See id.* at 83-93. Of the seven total allegations examined by the committee, the final three involved plagiarism. *Id.* For only one of these did the committee affirmatively find that Professor Churchill committed direct plagiarism. *Id.* at 86. Nevertheless, he was found to have committed "research misconduct" as to the other two allegations. *Id.* at 90, 93.

99. *See id.* (report of that committee).

It reviewed in excruciating detail Professor Churchill's history of the smallpox epidemic.[100]

Unlike Jared Diamond, who advances a general theory about the conquest of the Indians by means of gun and germs,[101] Ward Churchill used the term "genocide" in connection with the policies developed by the U.S. military in the 19th century.[102] One suspects that the criticism of Churchill's scholarship is not simply about evidence or omissions or erroneous statements of facts. It may be a visceral reaction to the use of the term "genocide" and to the assignment of blame to the U.S. government or military. The fact that the whites acting for the government actually wished the Indians dead is irrelevant unless facts can be adduced that show the intentionality which is claimed. In the end, the committee established by the university published its lengthy report and recommended by a vote of 3-2 that Ward Churchill be fired because of research misconduct.[103] At least two members of the committee thought that the misconduct was not sufficiently serious enough to justify termination.[104]

Debates about scholarship that rage in academia are not the stuff of spectator sports. The 1940 Principles reference to the record of a faculty member[105] should not be read as an invitation to reopen tenure decisions decades after they are made. The tenure process involves a decision by a department and subsequent oversight by the entire university. Concerns about the quality of scholarship are discussed thoroughly. Promotion and tenure committees examine outside reviews by scholars selected by a tenure committee as well as reviews by scholars selected by the candidate.

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100. *See* CHURCHILL REPORT, *supra* note 20, at 39-82.

101. *See* JARED DIAMOND, GUNS, GERMS, AND STEEL: THE FATES OF HUMAN SOCIETIES 354-75 (1999).

102. *See* CHURCHILL REPORT, *supra* note 20, at 12 (noting that Churchill's historical account of the smallpox epidemic is one of the primary examples that he uses "in support of his argument concerning intentional genocide against Indians on the part of the U.S. Army").

103. *Id.* at 102. The committee was careful to note that it was not the final authority in determining sanction, but was only asked to provide its "beliefs on the sanction question." *Id.* at 99. As noted above, the final decision regarding Professor's Churchill's status at the University was still pending at the time that this article was written. *See* Osher, *supra* note 95. The ultimate decision will be made by the board of regents for the university. *Id.*

104. *See* CHURCHILL REPORT, *supra* note 20, at 102.

105. *See supra* note 93 and accompanying text.

If, as in the Churchill case, a review can be initiated by any scholar who objects to what a faculty member said in any piece of scholarship anywhere or any time, tenure has no meaning at all.[106] The integrity of the entire process is compromised. Tenure provides security because it operates as a kind of assurance that a process has been completed. An academic pursues his career with the knowledge that his qualifications to teach and to do research have been examined and established to the satisfaction of his peers and colleagues.

The review decades later of scholarship completed early in a career is also problematic because the scholar might, in retrospect, question her own assumptions or disagree with the conclusions reached in light of subsequent experience or investigations, debate within the field, and critiques offered by colleagues in the field. As lawyers–and tenured or tenure track faculty–the reopening of tenure decisions raises issues of reliance and suggests that equitable doctrines ought to apply. The doctrines of laches or equitable estoppel ought to apply to any scholarship reviewed at the time tenure was awarded.

There is also a question about the standing of those who lodge complaints about the quality of scholarship. Who can make such a demand? Can a colleague at the same institution raise the issue? Can a complaint be raised by any other scholar in the field? Can members of the public or an elected official make such a complaint? There can be no doubt that the review of Churchill's scholarship was a direct consequence of public reaction and the unpopularity of his reported comments on 9/11. When the controversy arose, allegations of research misconduct were

106. *See* CHURCHILL REPORT, *supra* note 20, at 39 (listing Thomas Brown, a faculty member at Lamar University, as the origin of information leading to one of the allegations against Churchill). In February of 2005, the Interim Chancellor of the University of Colorado promised the public a "thorough examination of Professor Churchill's writings, speeches, tape recordings and other works . . . to determine if Professor Churchill overstepped his bounds as a faculty member, showing cause for dismissal as outlined in the Laws of the Regents." Remarks by Chancellor Phil DiStefano at the CU Board of Regents Special Meeting, Feb. 3, 2005, http://www.colorado.edu/news/releases/2005/49.html. The Standing Committee on Research Misconduct at Colorado could not act to recommend that a faculty member by dismissed unless it had a written complaint of research misconduct. Despite their ongoing public debate over the smallpox epidemic among the Mandan Indians, Professor Brown did not file a complaint until 2005, in the midst of the public controversy. Churchill Report, *supra* note 20, at 39 (citing Thomas Brown, *Assessing Ward Churchill's Version of the 1837 Smallpox Epidemic*, http://hal.lamar.edu/~BROWNTF/Churchill1.htm (updated Feb. 13, 2005)).

generated by scholars who had previously written criticisms of his work.[107] It would be a sorry situation for most academics if any critic of scholarship, especially one who was passionate about the flaws in a particular argument or in the methodology used by the researcher or writer, could trigger an investigation into the propriety of a tenure decision. It is precisely because of the risk of improper motive that we have created rules with respect to the initial tenure decision.[108] It is unclear whether or how such risks might be handled in an open-ended post-tenure review.

V. CONCLUSION

If there are lessons to be learned from the recent controversies about academic freedom, the most important is that academic freedom is as important today as it was in the 1930s and for many of the same reasons. There is no advocacy for the overthrow of the democratically elected government,[109] but there is a strong and vociferous criticism of the behavior of the United States government both in terms of domestic and foreign policy. Both supporters and critics of these policies can be found on campuses across the nation. Public statements by academics should be presumptively a matter of academic freedom. Rules of academic freedom must, as always, set limits on when and how issues of classroom misconduct or research misconduct can or should be raised.

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107. *See supra* note 106.

108. I assume here that the integrity of the tenure process remains intact. An egregious example of the distortion of the tenure process by a scholar who disagreed with the candidate is recorded in the sordid tale of the dispute between Alan Dershowitz and Norman Finkelsten, who was denied tenure at DePaul University. *See* Patricia Cohen, *Outspoken Political Scientist Denied Tenure at DePaul*, N.Y. TIMES, June 11, 2007, at E2. The feud between Dershowitz and Finkelsten was well known within the academy. *See* Patricia Cohen, *Bitter Spat over Ideas: Israel and Tenure*, N.Y. TIMES, Apr. 12, 2007, at E1; Mandy Garner, *The Good Jewish Boys Go Into Battle*, TIMES HIGHER ED. SUPP., Dec. 16, 2005, at 16. What was extraordinary was the aggressive way in which Dershowitz inserted himself into the tenure process. Alan Dershowitz sent the faculty at DePaul Law School and the Political Science Department a file that he described as a "dossier of Norman Finkelstein's most egregious academic sins, and especially his outright lies, misquotations, and distortions." Jennifer Howard, *Harvard Law Professor Seeks to Block Tenure for Adversary at DePaul U.*, CHRON. OF HIGHER ED., Apr. 13, 2007, at 13.

109. The exclusion of members of the Communist Party from the academy was premised on the fact that they were advocating the violent overthrow of the United States government. *See* Stoke, *supra* note 33, at 348 (arguing that the threat of the communist is taken too lightly within certain circles of Americans).

Faculty should have great latitude in making pedagogical choices: lecture or Socratic method, experiential learning, group projects, oral presentations, as well as different forms of assessment. An educational institution should not micro-manage classroom content, but it does have the right to structure the curriculum and to decide what must be taught and perhaps even make decisions about the best way to teach it. Academic freedom for students and faculty may be constrained by pedagogical imperatives imposed by the institution.

Faculty have the right to regulate the conduct of students in the classroom, to limit the participation of a student who is disruptive, or to regulate the manner in which the students address one another. They can choose to elevate a discussion by imposing limits on the character of remarks students make. They can ask that students support any argument with references to some authority or with logical reasoning. Students who complain that faculty are biased may actually be reacting to a criticism of their deficiencies in constructing a persuasive argument in support of their positions.

Faculty, however, are not free to abuse or misuse the power they have over students. If we require civility, which must refer to some level of decorum and courtesy, this standard applies to faculty as well as students. Students are right to complain when a faculty member uses epithets to describe public figures no matter how objectionable the conduct of that person. Such behavior is unprofessional, and if the behavior continues after complaints have been made, it seems to me that academic freedom is no protection.

Similarly, humor in the classroom is an effective pedagogical tool, but humor that employs stereotypes should be avoided. Even when arguments are made that are insensitive or that display pluralistic ignorance, not much can be done formally. Informal complaints and remedies are the appropriate response. Only when the attacks rise to the level of a racial or sexist epithet directed at a particular student is there grounds for formal action. Again, if the stated mission of the school is to provide an environment that is open and inclusive, aberrant behavior by a faculty member may be an expression of dissent or opposition to the policy itself. This opposition is something which we accept, but its expression is misdirected when students rather than administration and colleagues are attacked.

It is also important to distinguish between legitimate claims of discrimination and pseudo claims of discrimination. Conservatives have appropriated the language used to express the value placed on pluralism and diversity and argue that a self-conscious policy of inclusion should be used in the creation of class materials. They suggest and promote the idea that students and faculty who espouse conservative views are the victims of discrimination. Conservatives now want to claim the status analogous to those groups that were systematically excluded from educational institutions by policies that referred to their race, sex, or religion. The analogy will not hold. This particular version of alleged "viewpoint discrimination" is not discrimination at all but simply competition and disagreement.

Of course, certain forms of political speech in the classroom are problematic, particularly when they are unrelated to the course material. Formal sanctions should be reserved for only the most serious verbal assaults on students, speech directed at an individual or group of students equivalent in form and content to a racial epithet. Formal charges are appropriately encumbered with all the requirements of due process. In most cases informal inquiry into "classroom misconduct" would be preferable. Such inquiry could take the form of conversations with administrators or colleagues about standards of professionalism, including the intellectual sloppiness evidenced in the use of stereotypes, inattention to the sensibilities of students who have known or experienced invidious discrimination, or the inappropriateness of ad hominem attacks on colleagues. A considered and proportionate response is the best defense against those who would characterize standards that promote civil discourse as oppression.

Arguments about authenticity should have no place in hiring or tenure decisions. I say this as a Black woman who is of mixed race. I do not advertise the fact that my mother was white, nor do I hide that fact. I have discussed it in my own scholarship. As far as I am concerned, an inquiry into whether someone is authentically black is a non-sequitur. Being black is not about skin color or ideology. Identity with respect to race was a matter of law for more than a hundred years in the United States and, notwithstanding the introduction of mixed race categories and mixed race terminology, race in the United States is black or white, even when it comes to Indians or Latinos.

While I cannot speak authoritatively about what it takes to be an Indian, Indians have argued that identity is legally determined with respect to the membership rolls they keep or the membership rolls that were made at the time of certain treaties.[110] Beyond that, we can only assume that if a person has identified with a group and taken onto himself the burdens of identity as well as the benefits, identity is not a legitimate issue for consideration in any context.[111] Schisms within a community exist as do internal disputes, but they are just that–internal disputes. They are not properly raised in any action by a university or college.

The biggest threat to academic freedom is the ability of interest groups to mobilize quickly and to flood university administrations and political actors with demands that an invitation to speak be withdrawn or that a faculty member be fired. Often, the stories which inflame public opinion are exaggerated, inaccurate, or incomplete accounts of what was said, done, or written. Alternative media, such as blogs, podcasts, etc., facilitate this process. The stridency of these attacks is consistent with the idea that a cultural war now deeply embedded in popular and political culture.

One solution to the public hysteria problem is the creation of a mandatory "cooling off" period. Time and information can dissipate controversy, although not completely. A cooling off period is no protection if the political pressure on a public school is felt and acted on at the highest level of the university administration. In that case, no action initiated in a manner contrary to normal rules and procedures should result in termination of employment.

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110. *See, e.g.,* Vann v. Kempthorne, 467 F. Supp. 2d 56 (D. D.C. 2006) (ruling on preliminary motions in a case brought by Indians of African descent who had been given the rights of Cherokees under the Treaty of 1866 and were seeking to enforce their voting rights as members of the tribe); Davis v. United States 343 F.3d 1282 (10th Cir. 2003) (dismissing, on technical grounds, a case brought by Seminoles of African descent, seeking to share in government payments to the Seminole Tribe). The tribe had decided not to share with anyone who was not a Seminole prior to the time the U.S. Government officially recognized Seminoles of African and Indian descent. *Id.* at 1288. *See also* Brent Staples, *The Seminole Tribe, Running from History*, N.Y. TIMES, Apr. 21, 2002, at 12 (discussing some of the history leading to *Davis v. United States*).

111. For some of us, respecting a process of self-determination means living with the reality of race discrimination.

Under no circumstances should any institution initiate an open ended review of all past scholarship. Most of the time, scholarship is met with criticism in its own field. The scholar's reputation is enhanced or diminished because of this criticism. That should be sufficient. In any event, statutes of limitation or an equitable principle of laches should apply with respect to past scholarship, but not current or future scholarship.

Finally, and most importantly, in the world of symbolic inversion, freedom has become its own antonym. If the "free market of ideas" applies to anything, it is the competition between conservative and liberal ideologies. This is not a competition that can or should be regulated by the executive or legislative branch of government. The present attempts to intervene to protect the "freedom" of students or conservative faculty are not intended to promote fair competition, but to put a finger on the scales in favor of a side that seems to be losing ground. When the government intervenes to dictate what must be covered in classes or to require record keeping so it can exercise oversight with respect to the content of the speech on campus,[112] we are not even in the neighborhood of what was once known as "freedom."[113]

Great deference should be given to academic institutions which long ago established the terms and conditions under which ideas and knowledge claims compete in the academy. These standards are revisited with some regularity as faculty comment on and institutions update and revise the interpretations of the 1940 Principles. In the end, governments should treat academic freedom as part of a system of private ordering. This is a contractual term which is a matter of custom and usage in the academy and an implied term, if it is not otherwise made explicit, in every contract between a faculty member and the institution at which he or she teaches.

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112. *See supra* Part III (discussing the incidents at Missouri State University and the University of North Carolina and the resulting responses by the Missouri Legislature and the U.S. Department of Education).

113. The rhetoric of the early cases giving First Amendment protection to faculty and universities seems appropriate in this case. If the First Amendment "does not tolerate laws that cast a pall of orthodoxy over the classroom," Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967), if it is inappropriate to "impose any straitjacket upon the intellectual leaders in our colleges and universities," Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957), then it is hard to see how statutes such as that proposed in Missouri would ever pass constitutional review.

On the other hand, the relationship between an institution of higher education and the State, particularly when the institution is a publicly funded university or college, is one that certainly implicates the First Amendment and the Constitution. Any attempt to regulate the content of the curriculum, the academic affairs of a particular department, or the identity of invited speakers, could only be justified if everything we believe about the existing social order–the relative roles of educators and politicians, the role universities play in democracy, and the role they play in creating knowledge–were no longer true. Given the controversies that have arisen in the recent past, I would argue that exactly the opposite is true.

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